Nos. 79-1943, 80-193
(Consolidated)

IN THE

Supreme Court of the United States

October Term, 1980

No. 79-1943

JOSEPH ALESSI, RAYMOND BUISSON, STEPHEN MICHALSKI, CHARLES REPKA and T. EDWARD WHITE,

Appellants,

vs.

RAYBESTOS-MANHATTAN, INC. and RAYBESTOS-MANHATTAN, INC. EMPLOYEE RETIREMENT PLAN, jointly, severally or in the alternative,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 80-193

HENRY BUCZYNSKI, ALEX BORUSOVIC and OTHER RETIREES SIMILARLY SITUATED,

Petitioners,

vs.

THE GENERAL MOTORS CORPORATION,

Respondent.

On Writ of Certiorari to The United States Court of Appeals for the Third Circuit

MOTION OF NATIONAL STEEL CORPORATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF AMICUS CURIAE

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

NOW comes National Steel Corporation hereinafter ("National") and respectfully moves the Court for leave to file a brief *Amicus Curiae* in support of the position of Appellees Raybestos-Manhattan, Inc., and Raybestos-Manhattan, Inc., Employees Retirement Plan and Respondent The General Motors Corporation.

The question before the Court which National wishes to address is whether the Employee Retirement Income Security Act of 1974 prohibits a monthly pension benefit provided under a negotiated, non-contributory pension plan from being based, in part, on the workmen's compensation benefit that may be received by a retired plan participant. Such provisions are commonly known as workmen's compensation offsets.

National, the nation's fourth largest steel company, has entered into collective bargaining agreements with the United Steelworkers of America which provide for such workmen's compensation offsets. In entering into these agreements and determining their anticipated costs National took into account the savings that would result from such offsets. Accordingly National has a direct interest in the issue to be decided by the Court and in the continuing validity of such offsets.

Additionally National is a defendant in a class action *Tolbert* v. *National Steel Corporation* (S.D. Illinois, No. 81-3003) in which the plaintiffs are challenging the validity under ERISA of the workmen's compensation offset contained in the Granite City Steel Division of National Steel Corporation—United Steelworkers of America Pension Plan.

WHEREFORE National moves this Court to allow the filing of the Brief of Amicus Curiae National Steel Cor-

poration in support of the position of Appellees and Respondent which is submitted herein with the requisite number of printed copies.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE NATIONAL STEEL CORPORATION

The interest of *Amicus Curiae* National Steel Corporation is described in the preceeding motion for leave to file brief as *Amicus Curiae.*

SUMMARY OF ARGUMENT

Congress' concern in enacting the anti-forfeiture provisions of ERISA was to ensure that after an employee completed a certain number of years of service with an employer he would have a vested right to receive a promised benefit. A workmen's compensation offset contained in a pension plan is an integral factor in the plan's computation and determination of benefits to which a retired employee is entitled. It does not result in a complete denial of all pension benefits and obligations determined under the terms of the plan. Rather the net effect of the offset is to provide retired employees with a total monthly benefit that is equal to the entire benefit provided under the plan. Accordingly it is not a "forfeiture" of a retirement benefit as that term is defined under ERISA.

Workmen's compensation benefits and retirement benefits paid under a pension plan serve the same purpose—to recompense an employee for his loss of earning power. If a retired employee were to receive concurrently workmen's compensation benefits and retirement benefits under a pension plan, he would be receiving duplicate benefits while only suffering one wage loss. Since workmen's compensation benefits arise from a loss of earning power and are not a means of quasi-tort recovery, the commentators and the pre-ERISA cases recognize that it would be contrary to public policy and inconsistent with the nature of workmen's compensation to prohibit workmen's compensation offsets.

Summary of Argument.

Workmen's compensation offsets do not deprive retired employees of deferred wages which they have earned. Rather an employer must take into account the cost of providing pension benefits. If a pension plan contains a workmen's compensation offset the anticipated cost of providing pension benefits is less than if the plan did not provide such benefits. The savings resulting from the presence of a workmen's compensation offset in a pension plan permits an employer to provide to all employees a greater pension benefit or a different benefit that would not have been available absent the offset. If workmen's compensation offsets are not permitted employees will receive greater than bargained for total benefits and employers will be saddled with unanticipated, burdensome costs.

ARGUMENT

The Employee Retirement Income Security Act of 1974 does not prohibit the Monthly Retirement Pension Benefit provided under a negotiated, non-contributory pension plan to be based in part on the amount of the Monthly Workmen's Compensation Benefit received by a retired employee.

I. Introduction

In 1974, Congress enacted the Employee Retirement Income Security Act of 1974, P.L. 93-406, 88 Stat. 829, 29 U.S.C. Section 1001 et seq., ("ERISA")—a complex panoply of labor and tax laws governing this country's private pension system. Congress' purpose in enacting ERISA was (1) to establish minimum standards of fiduciary conduct for those dealing with retirement plans and (2) to improve the equitable character and soundness of private pension plans by requiring them (a) to vest the accrued benefits of employees who had significant periods of service with an employer, (b) to meet minimum standards of funding and (c) to guarantee the adequacy of the plans' assets. H.Rep. No. 533, 93 Cong., 1974 U.S. Code Cong., & Admin. News, p. 4639, 5655-5656.

The only question before the Court which will be addressed by Amicus National Steel Corporation is whether ERISA permits a monthly pension benefit provided under a negotiated, non-contributory pension plan to be based, in part, on the workmen's compensation benefit that may be received by a retired plan participant.

In the companion cases of *Buczynski* v. *The General Motors Corporation* and *Alessi* v. *Raybestos-Manhattan, Inc.*, the United States Court of Appeals for the Third

Circuit held that such workmen's compensation offsets were not prohibited by ERISA. The holding of that court was based on the validity of Treasury Regulation 1.411 (a)-4(a) (1979) which expressly authorizes workmen's compensation offsets and on the court's view that Congress did not intend to prohibit such offsets.

On November 3, 1980, the Court noted probable jurisdiction in the appeal of *Alessi* et al., and granted the petition for writ of certiorari of *Buczynski* et al., and consolidated the cases.

On January 6, 1981, the United States Court of Appeals for the Sixth Circuit decided *Utility Workers Union of America* v. *Consumers Power Company* (No. 78-1402, January 6, 1981). In that case the Sixth Circuit held that workmen's compensation offsets were a forfeiture prohibited by ERISA. The basis for the Sixth Circuit's holding was that pension benefits and social security benefits (which may be used to offset pension benefits) have the same "source of entitlement." On the other hand the Sixth Circuit reasoned that workmen's compensation benefits are paid solely because an employee has sustained an occupational injury within the course of his employment. Thus, the Sixth Circuit concluded that workmen's compensation benefits were not part of "an integrated and correlated retirement system" that could be used to offset pension benefits under ERISA.[1]

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1. Interestingly in reaching that conclusion the Sixth Circuit failed to note its prior decision in *Lofty* v. *Richardson,* 440 F.2d 114 (C.A. 6, 1971) in which it upheld the constitutionality of reducing social security disability benefits by the amount of workmen's compensation benefits received where the total received under the two programs exceeds 80 percent of previous average monthly wages.

Argument.

In this brief we will attempt not to restate the presentation of Appellants Raybestos-Manhattan, Inc., and Raybestos-Manhattan, Inc. Employee Retirement Plan and of Respondent The General Motors Corporation. We will address ourselves to certain arguments of the Appellants and Petitioners and to the opinion of the Sixth Circuit in *Utility Workers* concerning Congress' intent in adopting an anti-forfeiture provision; the nature of workmen's compensation benefits *vis-a-vis* retirement benefits; and the role of collective bargaining with respect to such benefits.

II. Workmen's Compensation Offsets Are Integral Factors In The Computation And Determination Of A Pension Plan's Benefits And Thus Are Not A Prohibited Forfeiture.

The pension plans which are the subject of this case provide, in effect, that the retirement benefit which a retired employee is entitled to receive will be reduced or offset by the amount of the workmen's compensation benefit, if any, that he receives from his former employer or on his former employer's behalf. There is no provision in ERISA which expressly prohibits such a provision. Indeed, the pertinent Treasury Regulations specifically permit such an offset as do those of the Pension Benefit Guaranty Corporation. See Treasury Regulations on Income Tax, 26 C.F.R. Section 1.411(a)—4(a); 29 C.F.R. Section 2605.2. Nevertheless the Appellants, Petitioners and United States Court of Appeals for the Sixth Circuit contend that such a provision constitutes a forfeiture prohibited by ERISA since a company could legitimize any forfeiture of vested pension benefits simply by including the forfeiture into the pension plan's computation procedures. We submit, how-

ever, that this reasoning misconstrues the meaning of the term "forfeiture" and fails to recognize Congress' intent in enacting the anti-forfeiture provisions of ERISA.

Section 203(a) of ERISA and Section 411(a) of the Internal Revenue Code each require that "an employee's right to his *'normal retirement benefit'* [be] *nonforfeitable* upon the attainment of normal retirement age." (Emphasis supplied.) Each section also provides that a plan must meet certain vesting requirements under which an employee-participant must be entitled to a certain specified percentage of his "accrued benefit" after a specified number of years of service.

The terms "accrued benefit" and "normal retirement benefit" are defined in Section 3 of ERISA for purposes of Section 203(a), and they are also defined in Section 411 of the Internal Revenue Code. The term "normal retirement benefit" is defined in ERISA and the Internal Revenue Code as "the greater of the early retirement benefit under the plan or the benefit under the plan commencing at normal retirement age." "Accrued benefit" is defined in ERISA and the Internal Revenue Code in the case of a defined benefit plan (as are the plans here) as "the individual's accrued benefit determined under the plan . . . expressed in the form of an annual benefit commencing at normal retirement age."

Finally the definition of the term "nonforfeitable" is contained in Section 3(19) of ERISA. That section states that the term nonforfeitable, when used with respect to a pension benefit or right—

> means a claim obtained by a participant or his beneficiary to that part of an *immediate* or *deferred*

> *benefit* under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan. (Emphasis supplied.)

Thus, the term "nonforfeitable" does not apply to the manner in which benefits are to be computed. Rather these sections provide that once an employee has completed a certain number of years of service he must be entitled to receive some benefit and the benefit which he is entitled to receive cannot be taken away from him. Put simply, Congress was concerned that after several years with an employer, an employee have a *vested* right to receive a promised benefit.

Indeed, this conclusion is supported by the pertinent legislative history (S. Rep. No. 383, 93 Cong., 1974 U.S. Code Cong. & Admin. News, 4890, 4930):

> Unless an employee's rights to his accrued pension benefits are nonforfeitable, he has no assurance that he will ultimately receive a pension. *Thus, pension rights* which have slowly been stockpiled over many years *may suddenly be lost if the employee leaves or loses his job prior to retirement.*
>
> Today slightly over two thirds of the private pension plans provide some vested rights to pension benefits before retirement. However, as a general rule, employees do not acquire vested rights until they have been employed for a fairly long period with a firm or are relatively mature. Since there is no general applicable legal requirement for preretirement vesting, some plans do not offer this type of vesting at all, and among those plans which do, there is no uniformity in the vesting rules as

provided. At present, only one out of every three employees participating in employer-financed plans has a 50 percent or greater vested right to his accrued pension benefits. As a result, even employees with substantial periods of service may lose pension benefits on separation from employment. Extreme cases have been noted in which employees have lost pension rights at advanced ages as a result of being discharged shortly before they would be eligible to retire.

* * *

For reasons indicated above, the committee concluded that it is necessary and desirable to provide a minimum standard of vesting for all qualified pension plans. (Emphasis supplied.)

The pension plans in question here, like most pension plans containing workmen's compensation offsets, provide for a normal retirement benefit that takes into account any workmen's compensation benefits received by a retired employee from the employer or on its behalf. Accordingly, the workmen's compensation offset is an integral factor in the plans' computation and determination of benefits to which a retired employee is entitled. Thus, it is not a forfeiture (1) of a normal retirement benefit or (2) of an accrued benefit as those terms are defined in ERISA. Rather, the workmen's compensation offset is used to determine the amount of a participant's normal retirement benefit to be received under the plan. Calling the offset a forfeiture is irreconcilable with the fact that the offset is a factor used to determine a normal retirement benefit. Thus, we submit that the offset cannot be considered a *forfeiture* of that benefit.

The cases relied upon by Appellants (Br. 14, 15) and Petitioners (Br. 20, 21) *Winer* v. *Edison Brothers Stores Pension Plan,* 447 F. Supp. 836 (E.D. Mo., 1978); *Keller* v. *Graphic Systems of Akron, Inc.,* 422 F. Supp. 1005 (N.D. Ohio, 1976); *Lewis* v. *Merrill Lynch Pierce Fenner & Smith,* 431 F. Supp. 271 (E.D. Pa., 1977); *Amory* v. *Boyden Associates,* 434 F. Supp. 671 (S.D. N.Y., 1976); and *Riley* v. *MEBA Pension Trust,* 570 F.2d 406 (C.A. 2, 1977) do not compel a different conclusion. These cases dealt with the validity of *denying* a participant a benefit on account of his entering the employ of a competitor rather than with the validity of *computing* a participant's normal retirement or accrued benefit. That is, they involve provisions which result in a complete denial of all pension obligations, while the provisions in question here involve the determination of the amount of the benefit to which the participant is entitled.

Thus, these cases reflect Congress' concern with employees' *vested* rights in retirement benefits not being forfeitable, rather than with the *formula* used to compute retirement benefits payable under a plan. Here, of course, the worker's right to his benefit is not disturbed by the workmen's compensation offset. Unlike the situation in the cases *supra,* where the retired employee lost his right to receive any benefit under the plan, a retired employee under the plans here receives the total benefit to which he is entitled regardless whether that benefit is paid under the plan alone or under the plan and under workmen's compensation.

The Sixth Circuit in *Utility Workers Union* (Slip. Op. 7) stated:

> If this Court were to accept the reasoning of defendants, a Company could legitimize any forfeiture of vested pension benefits simply by including the forfeiture into [sic] its pension plans' compensation procedures. Such result, however, would be contrary both to the provisions and the spirit of ERISA.

Yet our position here is not contrary to that of the Sixth Circuit with respect to the plan provisions that would deprive an employee of all the benefits due to him under the terms of a plan. Rather we only contend that an offset is not a forfeiture where, as here, it provides that the benefits payable by a plan are reduced if the retired employee receives benefits of a like kind from his employer or on his employer's behalf. Thus, where, as here, the net effect of the offset is to provide retired employees with a total monthly benefit *from an employer* that is equal to the entire benefit provided under the pension plan, it should not be considered a forfeiture.

III. The Nature Of Workmen's Compensation And Retirement Benefits Does Not Preclude Offsetting Pension Benefits Since Those Benefits Are Duplicative.

It is almost universally recognized that workmen's compensation benefits and retirement benefits paid under a pension plan serve the same purpose—to recompense an employee for his loss of earning power. Thus, if a retired employee were to receive concurrently workmen's compensation benefits and retirement benefits under a pension plan, he would be receiving a duplicate benefit while suffering only one wage loss.

Petitioners, Appellants and the Sixth Circuit fail to recognize the similar nature and purpose of such benefits. In *Utility Workers Union* the Sixth Circuit (Slip. Op. 20) quoted the District Court in that case:

> both the healthy and the maimed retirees would receive the same post-retirement income even though the burdens on the two are clearly disparate.

Even though this may be the case, we submit that it is not inequitable and that it should make no difference in determining the benefits that a retired worker will receive. Those who believe the contrary are under the mistaken belief that workmen's compensation provides for a quasi-tort recovery rather than a means of protecting against wage loss. Indeed, an analysis of the nature of workmen's compensation payments and pension retirement benefits reveals that each is designed to compensate an employee for his loss of earning power while a recovery in tort is intended to make whole those who have been wronged.

Professor Arthur Larson, who is this country's leading authority on the subject of workmen's compensation,

characterizes workmen's compensation as a wage loss protection system, similar to social security and private pensions, which, of course, are also means of protecting against wage loss. Moreover, Professor Larson recognizes that the nature and purpose of workmen's compensation differ fundamentally from damages recoverable as the result of the commission of a tort. First, the payment of workmen's compensation is dependent only upon the occurrence of a work-connected injury. Neither negligence nor fault of the employer or the employee are taken into account in determining whether an employee is entitled to payment. Second, the social philosophy behind workmen's compensation is that of providing protection and support and preventing destitution rather than righting a wrong—the concern of tort law. Third, unlike tort recoveries, under workmen's compensation the only injuries for which compensation will be received will be those producing a disability with a resulting loss in earning power. Moreover, the compensation will not restore to a claimant what he has lost. Rather, the compensation when added to the claimant's remaining earning ability will presumably enable him to exist without being a burden to others. See 1 Larson, *Workmen's Compensation Law*, §§1.00, 2.00-2.70.[2]

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2. Professor Larson's view of workmen's compensation is rooted in and supported by the cases. See e.g. *Heidler* v. *Industrial Comm'n.*, 482 P.2d 889 (Ariz. App., 1971) (Only disability from accident was sexual impotence which did not affect earning capacity. Claimant not entitled to benefits for disability, in the absence of a loss of earning capacity.); *Puffer Mercantile Co.* v. *Arellano*, 546 P.2d 481 (Colo., 1975) (Loss of testicle did not result in loss of earning capacity so that claimant not entitled to award.); *Scott* v. *C. E. Powell Coal Co.*,

For this reason Professor Larson recognizes that both workmen's compensation and retirement benefits payable under a pension plan are elements in an overall wage-loss protection system and rejects the concept that a worker should receive workmen's compensation benefits *and* retirement benefits as a result of that wage loss (4 Larson §§97.10, 97.51):

> Wage-loss legislation is designed to restore to the worker a portion, such as one-half or two-thirds, of wages lost due to the three major causes of wage-loss: physical disability, economic unemployment, and old age. The crucial operative fact is that of wage loss; the cause of the wage loss merely dictates the category of legislation applicable. *Now if a workman undergoes a period of wage loss due to all three conditions, it does not follow that he should receive three sets of benefits simultaneously and thereby recover more than his actual wage. He is experiencing only one wage loss, and in any logical system, should receive only one wage-loss benefit.* (Emphasis supplied.)

With specific respect to pension plan offsets Professor Larson states:

> Although avoidance of duplication cannct ordinarily be achieved under American statutes in these

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402 Pa. 73, 166 A.2d 31 (1960) (No recovery for loss of taste and smell.); *Fisher* v. *Consolidated Freight Wrap, Inc.*, 12 Ore. App. 417, 507 P.2d 53 (1973) (Pain and suffering not compensable unless the pain is disabling.) Thus the courts and Professor Larson have recognized that workmen's compensation payments are only to be made for the loss of earning power and that they are not the same as a recovery in tort.

> cases by, so to speak, trimming at the compensation end, it is frequently achieved by express language trimming at the private plan end, that is, by reducing the private benefits by the amount of any compensation payments. Even when the language of the plan is not specific, a court may give the benefit of the doubt to a construction that will avoid over-lapping payments . . . The implication seems to be that *duplication of benefits, even between a private pension and a compensation act, is so abhorrent to the court that the language of the pension scheme does not even "make sense" if it results in such duplication.* (Emphasis supplied.)

Various courts considering the question prior to ERISA reached this same conclusion. In *Fielder* v. *Travelers Insurance Company,* 79 Mich. App. 449, 263 N.W. 2d 9 (1977), the Michigan Court of Appeals held valid a workmen's compensation offset in a pension plan because (79 Mich. App. 452):

> The purpose of workmen's compensation is to recompense an employee for his loss of earning capacity due to a work-related injury. *Gasparick* v. *H. C. Price Construction Co.,* 399 Mich. 433, 490, 247 N.W. 2d 824 (1976). Similarly, we construe pension benefits as compensation for loss in earning capacity occasioned by the employee's ultimate retirement. Where, as here, early retirement is precipitated by a work-related injury for which the employee is receiving workmen's compensation, we find nothing offensive in a private contractual arrangement in which the employer and employee agree that the employee shall not be twice compensated for the same loss of earning capacity.

Similarly, *Mazor* v. *State of Maryland,* 279 Md. 355, 369 A.2d 82 (1977), involved a workmen's compensation offset. There, the Court of Appeals of Maryland stated (at 369 A.2d 88):

> Our holding recognizes that workmen's compensation is one facet of an overall system of wage-loss protection, and that the underlying principle of the system is to restore to the workers a portion of wages lost by physical disability, unemployment, or old age. It follows that although two or more causes of wage loss may coincide, the benefits need not be cumulative, for the worker experiences but one wage loss.

Thus, the authorities and courts have recognized that it would be contrary to public policy and inconsistent with the nature of pension benefits and workmen's compensation to prohibit workmen's compensation offsets. Indeed, if such offsets were not allowed, a retired employee might well receive combined payments from a pension plan and from workmen's compensation that exceed his pre-retirement income.[3]

Finally, in *Utility Worker's Union* the Sixth Circuit questioned (Slip. Op. 19) why a worker should seek workmen's compensation benefits if those benefits would result in an offset of his pension benefits. The question fails to recognize that often a worker will seek and receive workmen's compensation benefits before he re-

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3. See e.g. *Utility Workers Union,* Appellant's Brief p. 7, where it is stated that if the workmen's compensation offset was invalidated certain plaintiffs would receive workmen's compensation benefits and pension benefits totaling 119 percent of their pre-retirement wages.

tires. If he is partially disabled, he may continue to receive those benefits after he returns to work and after his retirement. Thus, a worker would elect to apply for workmen's compensation benefits, notwithstanding the offset, because of the immediate benefit he would receive.

Thus, we submit that the nature of workmen's compensation benefits is such that they may be properly offset against pension benefits. Whether an employee's income is reduced because of retirement or because of injury he has suffered only one wage loss and he may be compensated for that wage loss by receiving benefits from a pension plan, social security or workmen's compensation. Regardless of the source of those benefits he should be compensated only once.

IV. Disallowing The Workmen's Compensation Offsets Will Provide An Unexpected Windfall For Employees And A Costly And Unanticipated Burden For Employers.

Petitioners (Br. 32-35) and Appellants (Br. 18) go to great pains to argue that retirement benefits are wages earned during the course of employment but payable after the completion of the work career. The implication of their argument is that the workmen's compensation offset would deprive them of the deferred wages which they have earned. This argument misconceives the role that collective bargaining plays in determining the pension benefits that a retired employee is entitled to receive.

When an employer and a union enter into collective bargaining, they ultimately agree to the division of an

economic package of a certain value.[4] The form of benefits provided to employees in such a package includes wages and such fringe benefits as retirement benefits paid under a pension plan. Thus, when an employer, such as Amicus National Steel or the employers here, agrees to provide pension benefits to its workers, it must take into account the cost of providing those benefits. The *anticipated* cost of providing those benefits under a plan which contains a workmen's compensation offset reflects any savings represented by the offset which could be achieved either by way of a decreased pension liability or a decreased workmen's compensation liability. This anticipated savings results in a greater pension benefit or the provision of a different benefit that would not have been available absent the offset.[5] This fact was implicitly recognized by the Court in *Los Angeles Dept. of Power and Water* v. *Manhart* 435 U.S. 702. In discussing the effect that the allowance of a retroactive recovery would have on pension plans, the Court stated:

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4. Although this argument is addressed to the economic effect that prohibiting workmen's compensation offsets would have on employers like National Steel Corporation who adopt pension plans pursuant to a collective bargaining agreement, the economic effect would also be the same on employers who adopt pension plans outside of a collective bargaining situation.

5. Prior to the institution of the cases challenging the validity of workmen's compensation offsets, employers and unions representing employees would have had no reason to doubt the validity of such offsets. As noted, *supra,* Treasury Regulation 411(a)-4(a) specifically permits such offsets. Furthermore, in Rev. Rul. 68-243, 1968-1 C.B. 167, the Internal Revenue Service held that benefits payable under a state workmen's compensation law or an occupational disease law could be an acceptable offset against benefits payable under a qualified plan.

> These plans, like other forms of insurance, depend on the accumulation of large sums to cover contingencies. *The amounts set aside are determined by a painstaking assessment of the insurer's likely liability.* (Emphasis supplied.)

Thus, if workmen's compensation offsets are not permitted employees will receive greater than bargained for total benefits and employers will be saddled with unanticipated and burdensome costs. Moreover, in future years, other economic benefits provided to employees will necessarily be reduced by the added cost of disallowing workmen's compensation offsets.

V. CONCLUSION

For the reasons stated above, the judgment of the United States Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted,

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